Supreme Court, U.S.
FILED
06-957 NOV 04 2006
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

Jose Rene HERNANDEZ
Petitioner, Pro Se

vs.

Margarita ARELLANO, individually, Julie Beth TODARO, Roberta Ivy SHAFFER, individually, Mary Lynn RICE-LIVELY, individually, John DOE, graduate student, Margaret Ann YACKEY, graduate student, Peter LARSEN, graduate student, Amy FILIATREAU, graduate student, A.J. JOHNSON, graduate student
Respondents,

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

signed

Jose R. Hernandez
Pro Se PETITIONER
231 Wallace Rd
San Antonio, TX 78237-3115
(210) 434-1424
jrhernan2201@gmail.com

QUESTIONS PRESENTED for REVIEW

1. Does a graduate student in a public college have a constitutional or statutory right to a membership in a listserv provided by the college?

Petitioner was a member of a college listserv, (online forum), for two years prior to the alleged deliberate removal of his membership from the listserv by the Respondents in 2001.

2. Whether the Federal Rules of Appellate Procedure, F.R.A.P., like Rule 28 allows an appeals circuit to impose technical rigor on a pro se appellant?

Appeals Circuit Affirming of dismissal violates Petiioner's substantive rights because both the Circuit Panel and the district court committed fundamental error by ignoring documentary, objective evidence attached to and incorpoated in the Petitioner's complaint, in opposite to F.R.C.P. Rule 10 and a de novo review.

3. Under 28 U.S.C.§ 455, disqualification for bias, when a magistrate judge refuses removal, is there a provision that allows a moving party bringing forth a motion to disqualify a right to have a written record by the judge setting forth facts for a refusal to disqualify?

PARTIES to the PROCEEDINGS

"Petitioner"

Jose HERNANDEZ,

Hernandez is a Hispanic male, US citizen, resident of Texas; from 1999-2001 an enrolled graduate student in the library college at the University of Texas at Austin.

"Respondents"

Margarita ARELLANO, individually, (Associate Dean of Students for the University), Julie Beth TODARO, (college professor), Roberta Ivy SHAFFER, individually, (dean of the library college), Mary Lynn RICE-LIVELY, individually, (associate dean of library college), John DOE, Graduate Student, Margaret Ann YACKEY, Graduate Student, Peter LARSEN, Graduate Student; Amy FILIATREAU, Graduate Student; A.J. JOHNSON, Graduate Student, (all student association officers employed as listserv moderators and listserv owners for the library college in 2001.)

TABLE of CONTENTS

Questions Presented i

Parties to the Proceedings ii

Table of Contents iii

Appendix Table .....iv-v

Table of Authorities .....vi-vii

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions 1

Statement of Case
A. Factual Background 2
B. The Proceedings of lower court 14

Reasons for Granting the Writ 22

Under the rules of review, the Petition for Writ should be granted for the reason that the court of appeals has decided an important federal question in a way that is departed from the usual course of judicial proceedings, it has also sanctioned such a departure by the district court as to call for an exercise of this Court's supervisory power.

I. Waived Issues, F.R.C.P. 10 and F.R.A.P. 28 22
II. 28 USC § 455 Denied Motion to Disqualify 24
III. Contours of Right, determination of 25

Conclusion 29

Petition should be Granted, the lower court's judgment Vacated and Remanded.

APPENDIX TABLE

Appendix A.....1A

Panel Opinion from the Court of Appeals for the Fifth Circuit Affirming dismissal, filed 14th July 2006, unpublished, (App. LEXIS 17875), followed with the DENIAL of petition for En Banc Rehearing, filed 9th August 2006. (Barksdale, Stewart, and Clement, JJs)

Appendix B.....8B

Order and Final Judgment of the District Court, Western District of Texas, Austin Division, Chief Judge Yeakal granting Defendants' Motion for Dismissal under Rule 12(b)(6) for Failure to State a Claim, filed 1st of March 2005 and Denial of Reconsideration of court appointed counsel, and Denial of Petitioner's Motion to Disqualify Magistrate Pitman, filed 1st March 2005.

Appendix C.....15C

Report and Recommendations of the Magistrate Judge Pitman recommending Dismissal of Petitioner's Rule 7 Reply Complaint, filed 9th August 2004.

Appendix D.....32D

State Texas Statutory Code

Education Code: Title I General Provisions-Chapter 1 Secs 1.001 Applicability, Sec. 1.002 Equal Education Services or Opportunities. Title II Public Education-Chapter 4 Sec. 4.001 Public Education Mission & Objectives. Title III Higher Education. (Amended 1995) (abbreviated paragraphs only)

(Online http://tlo2.tlc.state.tx/us/statutes/ed.toc.htm)

Appendix E.....34E

Other corroborating material the Petitioner believes essential to understand the suit and his petition.

1) Official letter from Respondent Arellano given in person in October 2001 to Hernandez 34E

2) Letter from Office of Civil Rights, (OCR), Dept of Education sent in 2002 to Hernandez 36E

3) Email message from witness and graduate student Carlos Ovalle, sent to Hernandez in May 2001 ...42E

4) Printed webpage from university's website describing listserv operator's ability to unsubscribe members...44E

5) Printed webpage from college and university website giving description of the listserv in question 45E

TABLE of AUTHORITIES

Cases;.....Page,

ACLU v. Reno, 929 F.Supp. 824, 834-35 (E.D. Pa. 1996) aff'd, 521 U.S. 844, 138 L. Ed. 2d 874, 117 S.Ct. 2329 (1997) and S.Ct. oral argument 2, 29

Atwood v. Union Carbide Corp., 847 F.2d 278 (1988 US App. LEXIS 8405) 24

B.B Optische Industrie v. Hologic, Inc. 909 F.Supp. 162, 167 (S.D. N.Y. 1995) 23

Bd. of Education v. Pico 457 U.S. 853, 867-68 (1982) (plurality opinion) 26

Board of Regents v. Roth 408 U S. 564 (1972) 26

Chiu v. Plano ISD, 260 F.3d 330 (5th Cir. 2001) (opinion by Chief Justice King) 28

Conn v. Gabbert 119 S.Ct. 1292 (1999) 29

Cornelius v. NAACP 473 U.S. 788, 800 (1985).....29

Crawford-El v. Britton 523 U.S. 574, 612, 118 S.Ct. 1584 (1998) 28

Freeman v. Marine Midland Bank (1974 CA2 NY) 494 F.2d 1334 19

Gonzalez v. SAWS San Antonio Water System, no. 04-CA-218 (2004 US Dist. LEXIS 21922) 29

Jenkins v. McKeithen 89 S.Ct. 1843, 395 U.S. 411 (1969) 18

Kincade v. General Tire & Rubber 635 F.2d 501, (1981 US App. LEXIS 20536) 23

Lamont v. Postmaster General 381 U.S. 301 (1965)....26

Liteky v. United States 510 U.S. 540 (1994) 20, 25

Perry Education Assoc. vs. Perry Local 460 U.S. 37, 103 S.Ct. 948 (1983) 29

Riggan v. Midland ISD 86 F.Supp. 2d 647, 654 (US Dist.

LEXIS 2639) (W.D. TX 2000) 27

Schultea v. Wood 47 F.3d 1427 (5th Cir. 1995) 29

SEC v. Recile, 10 F.3d 93 (1993 US App. LEXIS 33899) 24

Stahl v. USDA 327 F.3d 697, 700-1 (8th 2003) 22

Steve Jackson Games v. U.S. Secret Service 36 F.3d 457, (1994 US App. LEXIS 30323) (5th Cir. 1994) 29

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513, 122 S. Ct. 992 (2002) 29

Taylor v. Appleton 30 F.3d 307, 308-9 (2nd 1994) 22

Union City Barge Line v. Union Carbide Corp., 823 F.2d 129 (5th Tex. 1987) 30

United States v. Rosalinda Miranda 248 F.3d 434 (2001 US App. LEXIS 6473) 24

Webster v. New Lenox School Dist., 917 F.2d 1004, 1005-6 (7th Cir. 1990) 23

White Buffalo Ventures v. University of Texas at Austin, 420 F.3d 366, 201 Ed. Law Rep. 57, (no. 04-50362) (5th Cir. 2005) 25

Widmar v. Vincent 545 U.S. 26,102 S.Ct. 269 (1981) ...29

Wilson v. Layne 119 S.Ct. 1692 (1999) 28

Federal Statutes,

42 U.S.C. § 1983 Deprivation of Rights
42 U.S.C. § 1985 (3) Conspiracy to Deprive
42 U.S.C. § 1981
42 U.S.C. § 1986 Failure to Protect
Civil Rights Act of 1965, Title VI, Title IX
42 U.S.C. § 2000(d)
28 U.S.C. § 455, 28 U.S.C. § 242

United States Constitution

Article III, judicial Power to actual controversies

First Amendment, freedom of speech, of association, right to petition grievance
Fifth Amendment, right of privacy
Fourteenth Amendment, Equal Protection under the law, Due Process, right of property and liberty

Federal Rules of Civil Procedure
F.R.C.P Rule 7,8,10, 11,12
Federal Rules of Appellate Procedure F.R.A.P. Rule 28

State Texas Statutory Code
Education Code- Title I General Provisions Chapter 1 Sec. 1.001 Applicability, Sec. 1.002 Equal Education Services or Opportunities (a). Title II Public Education Chapter 4 Sec. 4.001 Public Education Mission and Objectives. Title III Higher Education 26-27
(Online http://tlo2.tlc.state.tx.us/statutes/ed.toc.htm)

Other secondary sources
Roadblock: The Fifth Circuit Further Insulates Public School Systems from § 1983 Liability. Monica Hof Williams, 43 Loyola Law Review 649 (1998) 30

Federal Litigation Guide, 2006 by Matthew Bender & Company, Chapter 13. Rule 12 Motions 22

Moore's Federal Practice- Civil, 2006 Matthew Bender & Company, vol.2: Analysis: Rule 7-12 Chapter 10. Form of Pleadings 23

Symposium Practising Law Institute: *Qualified Immunity When Facts are in Dispute*, Leon Friedman, 16 Touro Law Review 857 Spring 2000, 858-9 28

Citations to Opinions and Orders

The Order and Final Judgment, unpublished, of the district court in *Hernandez vs. Arellano, et.al.*, no. USDC 1:03-CV-317-LY, is shown at Appendix B. The Court of Appeals for the Fifth Circuit in *Hernandez vs. Arellano*, no.05-5084, (US App. LEXIS 17878) Affirming dismissal, is unpublished by local Rule 47.5 and is shown in Appendix A. Panel circuit judges Affirming the dismissal are Barksdale, Stewart and Clement. The Order to DENIED the petition for panel rehearing and rehearing En Banc is shown in Appendix A.

Statement of Jurisdiction

Panel decision of the Court of Appeals Affirming was entered on the 14th of July 2006. The court granted a timely petition for rehearing and rehearing En Banc. On the 9th of August 2006, the Fifth Circuit Appeals DENIED petition for rehearing. Jurisdiction in the lower district court is under 28 U.S.C. §§ 1331, 1343. Jurisdiction of this Supreme Court is invoked under 28 U.S.C. § 1254 (1).

Constitutional and Statutory Provisions

42 U.S.C. § 1983 came onto law as § 1 of the Ku Klux Act of 1871. Section 1983 provides;

> "Every person who, under color of law of any statute, ordinance, regulation, custom or usage, of any State or Territory ... subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit equity, or other proper proceeding for redress."

The First Amendment gives U.S. citizens the right to freedom of speech and of association. The First Amendment extends to the Internet. The right of association under the First Amendment includes those organizations that conduct expressive activity. Petitioner

alleges the Respondents violated his First Amendment rights when they denied him an email membership in a listserv owned and operated by a public college in 2001.

STATEMENT of CASE

A. Factual background

In 1999 Petitioner HERNANDEZ became an enrolled graduate student in the library college and opted to receive two educational benefits provided to all students in the college of 1) an e-mail account and 2) a membership in two college listservs. Listservs are described as 'email exploders' in *ACLU vs. Reno* 929 F.Supp.824, 834-35 (E.D. Pa. 1996) aff'd., 521 U.S. 844.

The two listservs are under the control of the college. The listserv computer program is owned and licensed by the University of Texas. It is the listserv program that allows for individual college management. Daily management and administration of the listserv such as moderating posted messages is passed down to the officers of the student association of the college. The student association is sponsored by the college and is a registered association within the university. Registration allows the student association to receive benefits such as money but only if the student association agrees to comply with university regulations such as no discriminatory conduct. A membership in a listserv and a college email account makes-up an internal "mail system" provided by the college for graduate students in the library college. The college e-mail account also allows for students' personal, external use.

The college listserv, like an internal 'mail system', is intended to facilitate communication between the library college community of college faculty, the permanent staff and library college students. A listserv has been described as a 'one-to-many' email service. A listserv is much like an electronic or online bulletin board (online forum). In the Supreme Court oral arguments of *ACLU v*

Reno, the counsels described a listserv as an online newspaper where every member of the listserv is an author contributing articles for publication. A second description from *ACLU v. Reno* is that a listserv is a 'broadcasting system' where every allowed subscriber is a contributing author as well as a receiver and reader of information from everyone else's posted messages that are distributed by the listserv program to every subscribers' email address, ["one-to-many"] The email accounts and listserv are supported by the student services fees Petitioner paid with his tuition to the university. The money and benefits received by the registered student associations within the university are funded through student fees. Notably, Hernandez's membership in the two college listservs (online forums) and a college email account was personally processed and authorized by Respondent RICE-LIVELY as she was the technical supervisor for the college in 1999.

College Listserv,

For two years from 1999 to March 2001, Hernandez enjoyed and received the same educational benefits within the college as other graduate students with a college email account and membership to the listserv forum. There was never any technical disruptions or lack of service in his membership or email account until March 2001, only 24 hours after Hernandez had used his email account to send or post a message on the listserv and then received only one single reply message from a female student. In March 2001 this was the last time Hernandez was ever allowed to use the listserv forum in an unrestrictive manner as enjoyed by all the other library students. Hernandez graduated in May 2001.

After receiving only one reply from another student to his posted listserv message in late March, then no other messages posted by other college students or professors on other library topics was received or read by Hernandez as his membership to the college listserv had

ceased to exist. Hernandez later was told there was more than one reply message sent to the listserv by other students, to his posted message, but these replies were denied to him as his membership in the college listserv ceased to exist within 24 hours of his posted message.

After his graduation in May, Hernandez learns on his own that **it is possible** for the listserv administrators to use the command functions of the listserv software to remove, restrict or delete the membership of subscribers to the listserv without any notification to the subscriber or even his consent. This ability to remove subscribers is corroborated on the university website, a paper copy of which is attached in Appendix E. An email message from student witness Carlos Ovalle also corroborates this ability. Both Ovalle's e-mail message and a print copy of the website were incorporated in Petitioner's complaint.

Throughout this lawsuit and prior to, Hernandez always alleged that the removal of his membership to the college listserv and thus a denial of an educational benefit was a deliberate act by the Respondents to make Hernandez's presence in the college non-existent. By no longer able to communicate or engage in the give and take of discussions and expressive conduct within the college community through the listserv, Hernandez was completely unable to fully participate within the college as is afforded to all the other students. More importantly he was denied this ability to freely associate with other students and the college community despite having already been permitted to do so for two years prior to the unauthorized, not to mention unexplained or justified, removal and termination of his membership in the college listserv in late March 2001.

In April Hernandez makes his complaint of being denied an ability to fully participate known to Respondent SHAFFER, dean of the college. He then had his college email account also restricted and violated to the point that the Respondents deleted a weeks' worth of

his personal email messages at the end of May before Hernandez had an opportunity to retrieve them off the computer mail server owned by the university.

Denial of Listserv membership,

Hernandez was never notified about the change in his membership in the listserv in March but only weeks later found this out on his own by accident in mid-April. Once Hernandez could no longer receive the posted messages that the students and other members of the college community sent to each other via the listserv, Hernandez was forced to endure his last two months in the college as a 'non-person.' The listserv would automatically redistribute these messages to every subscriber in an efficient manner with no human intervention or effort. The student need only send one message to the listserv and the listserv would generate (post) multiple copies, one to each subscriber. But Petitioner was no longer a subscriber to the listserv he was unavailable to take part in the discussions or read the exchanged conversations on different topics about the library profession between the faculty and other graduate students or with permanent college staff. That this silencing and deliberate denial to allow Hernandez a chance to commingle within the library college community had rendered him a second-class student and was an attempt by the Respondents to force Hernandez to endure the remainder of his education in an academic and social 'vacuum.' Hernandez alleged in his suit and prior to that this animus against him by the Respondents is race and gender motivated given the severity of the act to him.

Respondents Rice-Lively as associate dean and Shaffer as dean of the college, in April, had known of Hernandez's soon graduation date was weeks away and so instead of providing him a meaningful and prompt investigation had engaged in an obstruction scheme by placing hurdles and lies and distortions to his complaints

and repeated requests for official college assistance and investigation. These lies and distortion by the defendant administrators of the college included a denial of knowing who the listserv managers were and their names, the actual abilities of the listserv command functions that allowed listowners to remove subscribed members, their refusal to identify the names of the students acting as listserv moderators. Then also a distortion of Hernandez's allegations of the removal of his membership when Shaffer and Rice-Lively informed both the college faculty and the university Ombudsman of some fabricated, fictional story Hernandez was telling. Another engaged obstruction scheme allowed by Shaffer and Rice-Lively was the removal of Hernandez's membership in a second college listserv in May. This second listserv called "mentoring" is provided by the college for library students to communicate freely only among other students enrolled in the library college.

Conduct by Respondents,

Respondents Shaffer and Rice-Lively intimidated other people in the college who might appear to be assisting Hernandez such as a female student volunteering in the college computer lab and the only Hispanic female secretary in the college who told Hernandez that "*talking to you is making my job difficult.*" Shaffer and Rice-Lively falsely informed the faculty of the college that Hernandez was making threats of violence so that this would dissuade other professors from helping him. Other conduct by Respondents is detailed in Petitioner's complaint.

In early April, dean Shaffer had unexpectedly announced to the college community, via the same listserv, that she would no longer be dean of the college as she had applied and accepted another employment out of state months earlier. Shaffer had no real intention of helping Hernandez or investigating his complaint because she was leaving on to bigger, and better things.

Hernandez included in his complaint a thorough listing of his actions and statements to Respondents together with their conduct in reaction in April, May. For example both Shaffer and Rice-Lively refused to restore Hernandez's membership in the listserv and refused him a meaningful attempt to investigate the matter when they both had the absolute authority and responsibility to do so. As state actors, Respondents Shaffer and Rice-Lively subjected Hernandez to a second-class student status and to discriminatory conduct. Shaffer and Rice-Lively as the chief administrators of the college had the power to restore Hernandez's membership to the college listserv within minutes but instead for weeks refused to do so and even denied that they had such an ability.

When Hernandez discovered the violation and alteration to his listserv membership in April he decided to inform the Office of the Ombudsman for the university and asked for their assistance. The office of the Ombudsman attempted to assist him and even contacted Rice-Lively to ask for an explanation. Rice-Lively's explanation to the Ombudsman as told to Hernandez by the ombudsman staff was vague, insubstantial and even included a claim that Shaffer herself, as dean, had approved of or had prior knowledge of the removal of Hernandez's membership to the listserv and that she, Shaffer, in some way deemed such action to be warranted or justified.

When Shaffer learns of Rice-Lively's comments she denies all of it by email message and then attempts to inform both Hernandez and the Ombudsman that she, as dean of the college, had no 'jurisdiction' of the college listserv or the student association. This is contrary to the university rules that state that a discriminatory complaint against a registered student association must be investigated by the sponsoring college. Hernandez incorporated Shaffer's email denial in his complaint together with a paper copy of Rice-Lively's comments to

the Ombudsman. The Ombudsman gave Hernandez a copy. Hernandez was dissatisfied with the progress by the Ombudsman and the college so the Ombudsman refers the matter to Respondent ARELLANO, the associate dean of students for the university.

ARELLANO provides Hernandez with only limited assistance and begins 'foot-dragging' herself as she refused to accompany Hernandez to the college to speak with Shaffer. Arellano did not meet personally with the college but only exchanged email messages or spoke to Shaffer by phone. Arellano's inaction becomes a paralysis to Hernandez's attempt to have his complaint investigated to the point that Arellano, using her office and position as a state actor, intimidates him and finally threatens his career by informing him that he "*will not receive references*" for employment once he graduates. Arellano told Hernandez the story of 'no on likes it when you rock the boat.' After Arellano threatens his career she asked him what he wanted and Hernandez asked that an apology be given to him from Respondent TODARO for the violation to his listserv membership. **Arellano agrees**, or gives the impression that she will get this apology from Todaro and then deceives Hernandez into believing that there are other options to proceed in his complaint against the college if no apology is given. The next day Arellano phones Hernandez and tells him he will receive no apology from Todaro. On May 23, Arellano informs Hernandez not to return to the college or her office to ask for further assistance specifically because none will be given. That neither she, the Office of the Dean of Students, the Ombudsman or anyone from the college would speak to him and that dean Shaffer had labeled Hernandez 'persona non-grata.' Arellano informed Hernandez he will receive no apology from anyone at the college, that in essence that he should go away and not come back. All of these events were detailed in his complaint with the district court.

Hernandez meets Todaro,

In February 2000, Hernandez was in a course taught by Respondent TODARO. This is the start of the basis of Todaro's animus against him. Hernandez made the honest mistake of telling Todaro that her close friend Ms. Polk mismanaged his practicum. For his degree, Hernandez must complete a practicum course. Ms. Polk is employed with the local school district and manages the practicum assignments. Hernandez had no idea of Todaro's dedication to Ms. Polk. Todaro did her practicum under Polk in 1974. This dislike for Hernandez by Todaro is the basis for her attempts to blackball and ruin his career in the library profession to the point that it was Todaro who instigated the violation of Hernandez's college email account and the removal of his membership in the college listserv in March 2001 by asking one of the graduate student defendants to remove his membership. Hernandez only learned of Todaro's involvement in May after being informed via email anonymously by someone in the college. There were other prior attempts by Todaro to retaliate against him like when she refused to return his research paper for six months while other students got theirs in two months. Todaro would disparage Hernandez's abilities to other students and openly ridicule his professional potential. In April 2001, Todaro learns of Hernandez's complaint from Shaffer and then attempts to intervene and circumvent the investigative process by meeting with Arellano in order to falsely gain her confidence and then turn her against Hernandez. Todaro makes the fatal mistake of telling Arellano that she does not know Hernandez personally and that she could not identify him. But Hernandez tells Arellano otherwise, that Todaro and Hernandez know each other well, and so Arellano then realizes the truth and understands that Todaro and Shaffer were deliberately hiding information and giving false distortions about his situation. This is why Arellano agrees to ask Todaro apologize Hernandez.

Todaro corroborates her involvement in Hernandez's practicum situation in a email message of which a copy was incorporated into his complaint in the lower courts.

Retaliation after graduation,

In May 2001, over the Memorial holiday, Petitioner emails the entire college community with his Internet email accounts like Hotmail to describe his situation and allegations and asks for assistance from the college faculty to help resolve his complaint but instead receives no official or unofficial response from anyone that gives any impression they are willing to assist him. One professor, Julie Hallmark, meets with Hernandez and tells him to "*hey, just get over it.*" No other professor was willing to speak to him even though his email message threatens legal action. In retaliation for this email letter by Hernandez to the entire college, the Respondents delete a week's worth of his email messages from his college mail account before he can retrieve them off the server at the beginning of June.

In October, Hernandez contacts the Ombudsman and Arellano to ask for a copy of his documents and any other paper materials concerning his allegations. Hernandez asks Arellano for a written, letter summary to explain his situation of how or what service was given to his request for assistance. Arellano provides Hernandez with an official letter with University seal but the letter contains only half of the true events that transpired in April and May and has no mention whatsoever of Todaro's involvement. Arellano signs her legal, official title on the bottom of the letter. A copy of Arellano's October letter is shown in Appendix E.

After this meeting in October with Arellano, the Respondents like Todaro engaged or paid others to continually stalk and harass Hernandez at his part-time library job and also when he moves to San Antonio in 2002. Then still more harassment when he briefly gains

federal employment in Kansas City in 2003. The stalking and harassment was intended to deny Hernandez access to his day in court and an ability to retain legal counsel. The harassment was intended to deny him contacting witnesses or continue investigating his situation.

Petitioner secretly tape-recorded Arellano's threats to his career in May 2001 and her agreement to have Todaro apologize for the violation to his membership in a college listserv. Hernandez filed his lawsuit pro se and had the tape recordings transcribed by a professional court report who affixed an affidavit and seal to the transcript. Hernandez incorporated this transcript and made specific references to it in his complaint but both the magistrate judge and the district judge had not one single mention of the transcript in their court rulings.

Neither did the appeals Panel make any reference to the transcript or to any of the other documents, papers and evidence that Petitioner submitted in his complaint that corroborates his situation such as words and statements made by the Respondents. One important example is Arellano's letter to Hernandez in October about his allegations against the college and the failure of the college to resolve the matter. Shown on the tape transcript is Arellano clearly telling Hernandez that there will be repercussions to his career, that his professional career after graduation will suffer.

True to Respondents' threats Hernandez is driven from his last library employment. He has not been able to gain any new employment in any other library position. He has been forced to default on his student loan of $38,000 and have his wages garnished. Then have his credit, his reputation and his life ruined because the Respondents refused to assist him in 2001 when they had the means, authority and responsibility to hold Todaro responsible for her actions to Hernandez.

Listservs generally; The last two documents in Appendix E are copies of websites giving a self-description of the college listserv. A general description of listservs is given in *ACLU v. Reno* 929 F Supp. 824, 834-35 (1996), is instructive; (citation is from *Barratt v. Catacombs Press* 44 F Supp. 2d 717 (E.D. Pa. 1999));

> "One-to-many messaging. The Internet also contains automatic mailing list services (listservs), ['mail-exploders'] that allow communications about particular subjects of interest to a group of people,... people can subscribe to a "listserv" mailing list on a particular topic of interest... The subscriber can submit messages on the topic to the listserv that are forwarded (by e-mail), either automatically or through a human moderator overseeing the listserv, to anyone who has subscribed to the mailing list. A recipient of such a message can reply to the message and have the reply also distributed to everyone on the mailing list. A recipient of such a message can reply to the message and have the reply also distributed to everyone on the mailing list. This service provides the capability to keep abreast of developments or events in a particular subject area. ...Users of "open" listservs...can add or remove their names from the mailing list automatically with no direct human involvement ... Listservs may also be "closed", only allowing for one's acceptance into the listserv by a human moderator." [emphasis]

Petitioner Hernandez was never able to gain such description about the college listserv from Respondents in 2001. Nor would they admit to Hernandez whether or not the college listserv was 'open' or 'closed.' Shaffer and Rice-Lively deceived Hernandez and pretended that the listserv does not have any human moderators. Also pretended no software allowed the removal of members.

The graduate student Respondents are the human moderators and the listserv owners in 2001. When Hernandez emailed the faculty of the college and most of the college students to explain his situation with the treatment he received, he was specific enough to include Arellano's words to him but still no one from the library college offered him any assistance. The obstruction scheming by the Respondents Shaffer and Rice-Lively to isolate Hernandez was so complete that when he attended the graduation ceremony, he was shunned and avoided by everyone else as though he had the plague.

US Dept. of Education

Petitioner filed a charge against the college with the Dept of Education, Office of Civil Rights (OCR), Dallas division but did not receive any assistance or investigation. In 2002 Hernandez learns from local and national newspaper articles the OCR was in fact already investigating the university when a female student had filed a complaint alleging (1) discriminatory conduct and (2) a deliberate, "foot-dragging" inaction by the university. The female student was in a different college than Petitioner. When the OCR administratively closed his complaint, Hernandez sought a review of the Dallas decision by writing a request to the Dept of Education in Washington, D.C., along with a same request asking for a review to the Secretary of Education, the Deputy Assistant, and the Dept. of Education Inspector General. The attached letter in Appendix E is the response from the Dallas OCR and Hernandez never received any other response from the others mentioned above.

The OCR office states it followed "policy procedure" but near as Hernandez can guess, the OCR didn't investigate his complaint because they, OCR, required him to first prove that Arellano had threatened his career because of a race or gender animus or motive. Hernandez requested to meet the OCR personnel in Dallas so he could play the tape-recorded conversation of

where Arellano threatens him in her office, but the Dallas office refused such a meeting. The university newspaper article describing the OCR investigation in 2002 specifically named Arellano's place of employment at the Office of the Dean of Students as the university office that the female student alleged was 'foot-dragging', or unresponsive to her discrimination charge. Both this newspaper article with one from the Chronicle of Higher Education were incorporated in Petitioner's complaint.

B. Proceedings of suit,

The district court dismissed Hernandez's complaint at the pleading stage by imposing heightened pleadings. Magistrate's Report does not discuss the documentary evidence attached to his complaint. The complaint is more than 100 pages with incorporated attachments. Half of the complaint is in narrative form, the other with numbered paragraphs. Both the magistrate and the district judge did not make one single reference to the narrative portion of the complaint. The district judge did not engage or discuss a single issue from Petitioner's Objections to the Report. No case is cited as authority to say Petitioner has no right to a college email account. When Hernandez appealed the dismissal as a pro se appellant, he raised multiple issues for review. But the appeals court imposed technical rigor and affirmed the dismissal while ignoring or failing to mention all the documentary evidence incorporated with the complaint. This in opposite to the meaning of a "de novo review." The Panel opinion stated that Hernandez was required to brief the issue on the omission of the documentary evidence under one specific subheading rather than briefing the issue under a second subheading. This second subheading issue was of disqualifying the magistrate for bias. Under this second subheading, Hernandez **did brief** the magistrate's failure to reference or take note of the attached, incorporated documentary evidence, adjacent, behind the complaint.

District chief judge Yeakal, in the Order and Final Judgment dismissing the complaint, made no attempt to clarify the law or provide one single citation to a legal case of authority. The lack of an elaboration of law or clarifying the legal basis by issuing a memorandum of law made the appeal more difficult for Petitioner. It was his pro se status that allowed the district court to ignore the narrative portion of his complaint.

Capacity of Respondents, defendants

Prior to this instance case, Hernandez filed a Motion To Perpetuate Testimony but it was dismissed in June 2003. Hernandez filed this instance case pro se in May 2003. In this instance suit the description of the defendant parties did not identify or specify the capacity of all the defendants. Hernandez was not sure what their capacity was either as 'officially' or 'individually' in terms of what violations of law were alleged against each defendant. Petitioner has never received legal training to become an attorney. That Hernandez is pro se with no one to assist him, the defendants used legalese tricky against him and denied him discovery. Examples of the lower courts' departure from the usual course of judicial proceedings is as follows.

Qualified Immunity,

The Respondents asserted qualified immunity but failed to demonstrate their entitlement or meet their burden of demonstrating their claim to immunity. Hernandez objected and timely filed this argument with the district judge to over-rule the magistrate's granting of qualified immunity, limiting discovery and ordering a Rule 7 Reply complaint. The district judge affirmed the magistrate's grant of qualified immunity to the defendants. Hernandez argued that the defendants had asserted immunity with only one sentence in their motion, filed 21 Aug 2003, by saying on page 2, quote;

"Claims 2. The Defendants are each entitled to

qualified immunity from all claims brought through 42 U.S.C. § 1983 against them in their individual capacities."

Hernandez objected to this motion arguing that nowhere in the motion did the defendants state if the graduate students were state actors and did not clearly explain if any of the defendants were acting within their discretionary employment duties. The district judge allowed the order limiting discovery and the order to file a Rule 7 Reply even though Hernandez had listed specific allegations and sufficient factual information in his complaint to give the defendants a clear notice of the claim and circumstances of what each defendant is alleged to have done in violation of constitutional and statutory law. The magistrate's Report grants immunity.

But in district court document # 29, filed 03/16/04, the magistrate's Order on page one, top paragraph, states;

"Defendants have not to date, however, sought a definitive ruling on their entitlement to qualified immunity. Rather, they have merely asserted the defense as a matter of an initial response. The Court is not, therefore, in a position to determine the merits of the issue of qualified immunity at this time."

Magistrate's Report,

On page eight, the top paragraph, the magistrate states;

"At no point in his complaint, however, does he make any specific allegations which identify who committed the 'violation,' when precisely the 'violation' occurred, how the 'violation' occurred, or even what the precise nature of the 'violation' was. Hernandez has, therefore, failed to state factual allegations against Defendants sufficient to support a claim of a First Amendment violation."

In a Rule 12 motion to dismiss, Hernandez is suppose to be given the benefit of doubt in all well-pled allegations.

Petitioner is easily capable of describing the who, what, when and how aspects of his complaint as shown above.

Moreover, Hernandez included, referenced and incorporated significant documentary evidence that corroborates some of the factual allegations. These documents were ignored by the magistrate in his Report. At the bottom of page eight in the Report the magistrate includes a footnote #3 where he states that...

> "...Plaintiff [Hernandez] has made a significant number of additional accusations of wrongful conduct on the part of Shaffer,... However, he has failed to make any allegations that these wrongful acts were ever directed at or affected him."

But the magistrate's Report does not discuss or explain why or how these 'wrongful acts' by Shaffer are not important to the lawsuit. The magistrate abused his position to summarily ignore and waive issues raised by Hernandez in his attempts to meet the specificity required in a Rule 7 Reply. Magistrate, by this omission, together with the failure to notice or refer to the attached documentary evidence, along with his failure to accept all well-pled facts as true is proof of his bias. Hernandez timely filed a sufficient motion to disqualify the magistrate for bias before he actually received the Report. After receiving it, Hernandez added other examples of bias in a Supplement Motion. The Final Judgment to dismiss denied the motion to disqualify but gave no reason or basis. The district judge's statement that Hernandez "solely" based his disqualification on the Report is false and wrong. The accusations listed against Shaffer in magistrate's footnote 3 involve her refusal to investigation or give meaningful assistance to Petitioner. Other accusations against dean Shaffer involve how the college manages the listserv. These two issues are obviously significant to the lawsuit. Lower court cited no case on point to argue Hernandez has no right to an email account in a public college or listserv membership.

Fundamental Error,

Obviously the tape-recorded transcript would corroborate that Respondent Arellano believed Todaro was responsible enough or had direct involvement in the removal of Hernandez's listserv membership. Enough so that she agreed in May that she would ask Todaro to apologize to Hernandez for her involvement in order to bring about some final resclution to his situation. Judge Yeakal gave no review or discussion of Hernandez's alleged factual background from the court complaint.

The appeals court also ignored the attached documentary evidence. Panel opinion states Hernandez failed to properly brief this issue of failure to notice the incorporated documents. The appeals court's position is misapplied as they are responsible for giving a constitutional lawsuit, like Hernandez's, a plenary or de novo review. Panel must not give deference to the district court and repeat the same error or omission.

Other issues,

Hernandez filed his motion to disqualify the magistrate prior to receiving the Report. He included the magistrate's denial of a court appointed counsel which was by stating the lawsuit was plain, uncomplicated and "straight forward." Also in the motion was the magistrate's refusal and denial to Hernandez's request to have the district court supervise the pre-trial conference. This denial based on the defense counsel's assertion that Hernandez's motion was "without merit." Neither defense counsel nor magistrate defines or explains why a motion to supervise is "without merit."

The dismissal of Hernandez's complaint at the pleading stage was premature. A motion to dismiss on the pleadings alone, at such an early stage, requires that the material allegations by the nonmovant Hernandez are taken as admitted as true by the moving party, the Respondents. see *Jenkins v. McKeithen* 89 S.Ct. 843, 395

395 U.S. 411 (1969). Under a Rule 12(b)(6) motion it is reversible error to exclude affidavits incorporated in a complaint which show a trial able issue of fact exists. see *Freeman v. Marine Midland Bank- New York* (1974 CA2 NY) 494 F.2d 1334. The magistrate's Report stated different facts and descriptions of events that are opposite to those in which Hernandez alleged in his complaint. One specific example has the magistrate asserting that Arellano did not agree to ask or make Todaro apologize to Hernandez despite evidence proving to the contrary in the transcribed tape-recorded conversation. The transcription was made by a professional court reporter who had affixed an affidavit and seal attesting to the authenticity of the transcript. The transcript was incorporated to the Reply complaint.

Hernandez made a motion to amend his complaint so he could add the university as a defendant. This would have made some of the Respondents sued in both their official and individual capacity. The technical purpose of a having a clear statement of 'capacity' is to determine whether a party can be sued and capacity should not be used to determine if a violation has occurred. District judge gave no legal basis to deny the motion to amend.

Proceedings of Fifth Circuit.

Panel Opinion was a short document that was only two pages, (third page is the caption), and had only five cited case authorities despite the nine issues raised for review by Petitioner. The Panel opinion does not even say that Hernandez is given a 'de novo' review and Hernandez posits that he did not get a review anew with no deference to the district court's ruling.

Panel's cited authorities

Of the five cited authorities by the Panel opinion, only two are First Amendment cases. A third is about disqualification of a judge for bias, a fourth is on the F.R.A.P. 28 failure to brief waives issues and the last cite

is misapplied here because that cited authority had facts and circumstances opposite of Hernandez. Specifically the Panel's cited case was not about a pro se plaintiff nor was it about being denied discovery as Hernandez alleges he was denied but instead the Panel's cited case had experienced counsel and conducted "extended discovery." That counsel had warning by district judge that there is no 'cause of action' in their alleged facts.

Panel's cited authority for the issue of disqualification is improperly applied and a confusing citation because the Panel attempted to argue that Hernandez's issue of disqualification was "frivolous." But the Panel's cited case, *Liteky v. United States* 510 U.S. 540 (1994), gives no definition nor does it make a single description or reference of what is meant by "frivolous." The word frivolous is nowhere in the *Liteky* case, neither in the majority nor the dissenting opinion.

Hernandez argues the two Panel cited cases are misconstrued or a distorted application of legal analogy. These two cases involve First Amendment issues but neither has anything to do with a college setting or for that matter with email accounts and absolutely nothing about a listserv. Hernandez believes the Panel acted outside the normal judicial proceeding in making or defining law about an important First Amendment issue with a misplaced, faulty analogy. This is an example by Petitioner of a bad analogy to make a flawed legal point;-

> "It is established that there are free speech restrictions on military installations, therefore Hernandez has no free speech right in a public college outside the same military restrictions."

Panel opinion applied a similar analogy to argue Hernandez has no right to a listserv in a public college. This is faulty reasoning because the two places are different settings from a college. The Panel opinion used a bad analogy to argue Hernandez did not state a claim

of a violation that warranted relief in federal court. In a normal proceedings it is the facts, circumstances and intent of the forum in question that determines whether Hernandez has a legal right to the college listserv. Not an arbitrary, ill-conceived analogy by the circuit Panel.

What is relevant about the two cited First Amendment cases by the Panel is that both of those cases dealt with a state related forum or state property and both of those cases were allowed to run the full fanfare of a lawsuit with discovery and most importantly, both cited cases were given a forum analysis. Hernandez's complaint was not given a forum analysis; was denied discovery by the defense counsel and was refused court appointed counsel first by the magistrate and then again by the district judge.

F.R.A.P. 28, Briefed issues

Panel's opinion about the waiver of issues because of failure to brief is also a misapplied citation. The case cited by the Panel was of a pro se convict appeal. The convict attempted to exceed the page limit on his brief by attaching his district court complaint. That Panel in the convict's appeal cited authority denying such an abuse by the convict and struck the attached complaint to limit the page number on his brief. That circuit judge then determined a failure to brief the issues were waived under F.R.A.P. Rule 28. The issues raised by the convict were nowhere within the four corners of his brief. But in Petitioner's appeals brief, he did not exceed the page limit, he did in fact brief within the four corners the issue of documentary evidence attached to his complaint but ignored by the lower court. Hernandez simply did not brief this particular issue under one specific subheading that the Panel required of him. Panel misconstrued that he did not fully brief the issue which makes it waived. But Hernandez **did brief the issue** of the magistrate's failure to reference or notice the documents under the subheading of the magistrate's bias

against Hernandez. Panel, however, argued Hernandez did not brief this issue properly in a manner they required, in opposite to the guideline of the F.R.A.P. 28 within the four corners of a brief. Both the district court and the appeals Panel did not give pro se Hernandez the liberal construing of his complaint and his brief. The lower court did not draw all inferences in his favor as the nonmovant in a Rule 12 motion. And did not accept as true all well-pled allegations. Neither the district judge nor Panel gave Petitioner Hernandez a de novo review.

REASONS for GRANTING WRIT

I. Waived Issues, F.R.C.P. 10, 12 and F.R.A.P. 28

The district court and the appeals circuit committed fundamental error by ignoring documentary evidence and materials attached to and incorporated in Hernandez's complaint. The F.R.C.P. Rule 10(c) states that "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purpose." The same is said in the *Federal Litigation Guide*, 2006 by Matthew Bender, Chapter 13 Rule 12 Motions, quote;

> "P 3.93 Materials Considered by Court. [1]--Pleadings and Matters. A Rule 12 (b)(6) motion is addressed to the face of the pleadings. A court may consider the pleadings, **documents referred to in the pleadings**, and matters of judicial notice... motion to dismiss. (*Stahl v. USDA* 327 F.3d. 697, 700-1 (8th 2003)." [emphasis added]

Moreover, the *Federal Litigation Guide* continues quote;

> [2] - Materials Court May Consider Without Converting Motion. Unless the court converts...to a motion for summary judgment, the court may consider only the following materials;...
> - Facts alleged in the complaint
> **-Documents attached as exhibits to complaint** (*Taylor v. Appleton* 30 F.3d. 307, 308-9 (2nd 1994)
> -Documents that have not been attached to the

complaint or incorporated by reference if the complaint **relies heavily** on the documents and the **documents are integral** to complaint. [emphasis]

Petitioner also asks the Court to take notice of *Moore's Federal Practice- Civil*, 2006 by Matthew Bender Comp., vol. 2: Analysis: Rule 7-12 Chpt 10 Form of Pleadings; §10.05 Exhibit to Pleadings is Part of Pleading, quote-

[1] -...A **copy of any written instrument** that is an exhibit to a pleading becomes part of the pleading for all purposes. [emphasis added]

[2] -Types of Written Instruments Permitted as Pleading Exhibits. Among the varying types of written instruments permitted as pleading exhibits are...deposition transcripts, **letters of correspondence**, (*Webster v. New Lenox School Dist.*, 917 F.2d. 1004, 1005-6 (7th 1990). [emphasis]

[3] -Guidelines for Attachment of Pleading Exhibits. Rule 10(c) is silent on how exhibits are to be attached, numbered, and sized.

[4] -Unattached...A written instrument not formally attached to a pleading that is offered **in opposition to a motion to dismiss the pleading** may be considered by the court deciding the motion, if there was **a "clear and definite reference"** to the instrument in the pleading. (*B.B Optische Industrie v. Hologic* 909 F.Supp. 162,167 (S.D. N.Y.1995)

A pro se plaintiff in a federal suit against state actors should not required to be proficient in the litigation process or be required to inform the court of such before the court actually gives plaintiff the proper process. A liberal construing of a pro se document includes his appeals brief even under F.R.A.P. 28. The Fifth Circuit has ruled as such for a general liberal interpretation of an appeals brief with counsel in the following cases:

(1.) *Kincade vs. General Tire and Rubber*, 635 F.2d 501, (1981 US App. LEXIS 20536) quote; "As a general rule,

briefs are read liberally with respect to ascertaining what issues are raised on appeal;..."

(2.) *Atwood, et.al., vs. Union Carbide*, 847 F.2d 278, (1988 US App. LEXIS 8405), "We **liberally construe briefs** in determining issues presented for review."

(3.) *SEC vs. Sam Recile*, 10 F.3d 1093, (1993 US App. LEXIS 33899), "We **liberally construe briefs** in determining issues presented for review."

(4.) *U.S. vs. Rosalinda Miranda,* 248 F.3d 434, (2001 US App. LEXIS 6473), Fifth Circuit judge Parker stated;

> "Failure to satisfy the requirements of Rule 28 as to a particular issue ordinarily constitutes abandonment of the issue. However, the issues-not-briefed-are-waived rule is a prudential construct that requires the exercise of discretion ... We may consider such an issue, particularly where substantial public interests are involved. ... **Moreover, we must liberally construe briefs** in determining what issues have been presented for appeal." [emphasis added by Petitioner]

The Panel judges of Barksdale, Stewart and Clement, abused their discretion and departed from the usual course of normal judicial proceedings in not giving Hernandez a liberal construing of his appeals brief.

II. 28 USC § 455, Denied Motion to Disqualify

Disqualification under §455 ensures the appearance of judicial integrity because it serves as an avenue of relief for a party that believes the court has become bias. Hernandez believes the magistrate become or showed his bias against him or his complaint and timely raised his concern by filing a motion to disqualify listing the allegations. The district judge denied motion and made a factual error by stating the motion to disqualify was solely based on the Report when in fact the motion was filed prior to the issuance of the Report. The Panel affirming the denial gave a less than substantial reason

and only added confusion with a flawed citation. Petitioner has yet to receive a fair and complete review on the motion to disqualify. It is not the actual proof of bias; .."what matters is not the reality of bias or prejudice but its appearance." *Liteky v. U.S.* 570 U.S. 540, 548 (1994). In every rulings or Report by the magistrate, it was always against or disadvantaged Hernandez or his suit. In *Liteky,* a similar example is given by Justice Scalia, (majority opinion), where a jury member who always votes for the defendant party may be viewed as bias but not the jury member who always votes for the merits of a case. After receiving the Report, Hernandez was able to add other allegations of bias.

III. Contours of Right, determination of

The issue of whether Petitioner has a right to an email account in a public college is an important issue. The Fifth Circuit said as much in *White Buffalo Ventures vs. University of Texas at Austi*n, 420 F.3d 366, no. 04-50362 (2005). On the first paragraph, that Panel stated;

> "White Buffalo sought to enjoin UT [university] from excluding its incoming mail [sent to staff and students] ...this case presents several novel issues, the significance of which will grow proportionally with heightened cultural and economic reliance on the Internet, we affirm."

Hernandez filed his suit in 2003 in the same district court as *White Buffalo* did, only seven days apart. When *White Buffalo* filed a Motion for Summary Judgment against the university it stated as an argument that the university, through depositions and discovery, had admitted and supported the idea that the faculty and the students have a First Amendment right to the email accounts the university provided as well has a right in the use of a university email account for personal use. [see *White Buffalo* document #38, page 5, filed 02/13/04] If this First Amendment right is supported as a right or

privilege by the university in *White Buffalo,* then Petitioner has a right to receive those sent email messages from students in the college. This means Petitioner's denial of a membership in the college listserv did state a claim of a constitutional violation. The right to receive information is precedent under *Lamont vs. Postmaster General* 381 U.S. 301 (1965). The National Archives and Records Agency, NARA, catalogs a sent email message as a 'record', like a paper record. Also a constitutional precedent is that "the right to receive ideas follows ineluctably from the sender's First Amendment right to send them", *Board of Education vs. Pico* 457 U.S. 853, 867-8 (1982) (plurality opinion).

A right or a privilege is recognized when a showing is made to its entitlement by a contract or statutory code, rather than having a unilateral expectation of it, see *Board of Regents vs. Roth* 408 U.S. 564 (1972). Hernandez claims a right and entitlement under the state Texas Statutory Education Code (amended 1995), specifically, Title I General Provisions, §§ 1.001, 1.002, Title II Public Education, Mission Objectives. and Title III Higher Education [quoted portions in Appendix D] In the Title III Higher Education, it lists the University of Texas at Austin [UT] as an institution subjected to the Education Code. From Title I, Chapter 1 General Provisions, sec 1.001 Applicability (a) it is stated;

> "This code applies to all educational institutions supported in whole or in part by state tax funds unless specifically excluded by this code."

Importantly relevant, in §1.002 Equal Educational Services and Opportunities (a), Chapter 1, it states;

> "An educational institution undertaking to provide education, services, or activities to any individual within the jurisdiction or geographical boundaries of the educational institution **shall provide equal opportunities to all individuals** within its jurisdiction or geographic

boundaries pursuant to this code." [emphasis]

Both UT and the college are supported by state tax funds and are subjected to the Texas Education Code and are required by state statute to provide equal opportunities to all students like Hernandez in 2001. Moreover, in Title II, subtitle A. General Provisions, chapter 4 Mission, Objectives, and Goals, § 4.001 states,

> "The mission of the public education system of this state is to ensure that all Texas children **have access to a quality education that enables them to achieve their potential and fully participate now and in the future** in the social, economic, and educational opportunities of our state and nation." [petitioner's emphasis]

When Hernandez was denied an education benefit or service provided to all students in the college in 2001 like an email account and membership in the listserv, he was denied access to a quality education and an equal opportunity to fully participate within the college. Then later denied a benefit in pursuing a chosen profession free from state interference. A similar determination of denial to a quality education was made in *Riggan v. Midland ISD* 86 F.Supp. 2d 647, 654, (US Dist. LEXIS 2639) (W.D. TX 2000). Riggan, a white male high school senior was 'denied' contact with teachers and students for 8 days during a suspension pending a determination of violations of school regulations. That district court ruled Riggan's denied contact in school was a denial of a "quality education" right under Texas statutory code.

Hernandez, a Hispanic male, was denied two months of a full educational process and interaction with other library college students in his last semester by the white female Respondents in 2001. By the tuition Hernandez paid and the university catalog, he had an **implied contract** with UT to be treated fairly and equally like other graduate students in the library college in 2001.

In a constitutional-tort suit with qualified immunity issues, the first step the court does is determine if a right has been violated or if the contours of a right were reasonably established that a state official would know they were violating a right. see *Conn v. Gabbert* 119 S.Ct. 1292 (1999), *Wilson v. Layne* 119 S.Ct. 1692 (1999). One secondary source said that the court *must* use this approach. see Friedman, Symposium Practising Law Institute: *Qualified Immunity When Facts are in Dispute.* 16 Touro Law Review 857 Spring 2000, page 858-9. The Fifth Circuit followed this process in *Chiu vs. Plano* 260 F.3d 330 (2001) (by Chief Justice King) quote;

> "B. First Amendment Forum Analysis....our determination of the character of the forum in which expression was regulated shapes our determination whether a clearly established right existed and our ultimate conclusion whether a constitutional violation occurred."

The two cited authorities from Panel's opinion involving a First Amendment issue did have discovery and a forum analysis. In this instance case, Petitioner did not receive any determination as to whether a contour of a right was clearly established nor was he given a forum analysis by the district court or appeals circuit. Hernandez was denied under a Rule 12 to have his version of well-pled allegations taken as true or deemed admitted by defendants. Hernandez was denied the objective documentary evidence incorporated in his complaint which corroborates his allegations. This 'objective evidence' is described in the dissent opinion of *Crawford-El v.Britton* 523 U.S. 574, 612 (1998). The objective evidence like the tape recorded transcript of Hernandez's conversation with Arellano shows that she knew she was violating his rights or privileges when she told Hernandez he would need to sign a nondisclosure agreement in order to receive Todaro's apology for the removal of his membership in a college listserv.

It is well established that a school or state institution could create a forum from state property or school facilities, see *Perry Education Assoc. v. Perry Local* 460 U.S. 37, 103 S.Ct. 948 (1983), *Widmar v Vincent* 545 U.S. 26, 102 S.CT. 269 (1981). Once a state or school creates a forum, an admitted member to the forum may not be excluded without reason or justification, "unless the exclusion is necessary to serve a compelling state interest." *Cornelius vs. NAACP* 473 U.S. 788, 800, 105 S.Ct. 3439 (1985). It has also been possible to delete email messages and remove a membership from a listserv once a party is in possession of a computer that is being used to store those messages, this possibility stated in part in *ACLU vs. Reno* and in *Steve Jackson Games vs. United States Secret Service*, 36 F.3d 457, (1994 US App. LEXIS 30323) (5th) So Hernandez's claims of having his membership removed from a listserv is known to be possible and is not a conclusory allegation as the Panel and magistrate have stated.

CONCLUSION

A pro se plaintiff complaint should not be dismissed in such an early stage of litigation by imposing a heightened pleading burden. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513, 122 S.Ct. 992 (2002).

The Fifth Circuit does not recognize *Swierkiewicz*, see *Gonzalez vs. SAWS San Antonio Water System*, no. 04-CA-218XR (2004 US Dist. LEXIS 21922), states;

> "The Fifth Circuit has not had occasion to consider whether its 'heightened pleading standard' in section 1983 cases involving qualified immunity was affected by *Swierkiewicz*, ... Because *Swierkiewicz* did not involve qualified immunity and does not directly overrule *Schultea* [*vs. Wood* 47 F.3d 1427 (5th Cir. 1995)], this Court will continue to apply *Schultea* framework until the Fifth Circuit or Supreme Court directs otherwise."

Now is the time with this instance case with the Petition for Writ can the Supreme Court inform the Fifth Circuit of otherwise. The Fifth Circuit has always imposed hurdles or other barriers against plaintiffs in suits against state actors or institutions for constitutional violations. see *Roadblock: The Fifth Circuit Further Insulates Public School Systems from § 1983 Liability,* by Monica Hof Williams, 43 Loyola Law Review 649-78 (1998). The district court dismissed by applying heightened pleadings even though the defendants failed to meet their burden of demonstrating their entitlement to qualified immunity. The circuit court imposed technical rigor on Hernandez's appeals brief. Petitioner requested a court appointed counsel and was twice denied. Defense counsel argued the federal rules of procedure were enough aide to Hernandez. Petitioner motioned to have the district court make the defense counsel give him a pre-trial conference so that discovery could commence but was refused by the magistrate. A discretion of a district court to control its docket cannot be used to "undercut potency of discovery control measures, including Rule mandating holding of discovery conference upon proper motion by party," see *Union City Barge Line vs. Union Carbide Corp.,* 823 F.2d 129 (5th Tex. 1987). For all the reasons above this Petition must be **Granted** in order to **Vacate** and **Remand** the lower courts' judgment made outside of normal judicial proceedings and opposite to Supreme Court precedent. A upholding of the dismissal only rewards the Respondents' conduct in 2001. The lower courts did not make one single factual determination. Personal choices like a professional career and a self-defining association are the essence of a liberty right.

Respectfully Resubmitted _____

PETITIONER, Jose Hernandez
231 Wallace Rd,San Antonio, TX 78237
(210) 434-1424, December 2006